JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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ASSAULT WITH INTENT TO RAPE.

Morrow v. State, Ga. App., 79 S. E. 63. *Mental Capacity of Victim.* Defendant appealed from a conviction of assault with intent to rape, on the ground that the verdict was not supported by the evidence. The proof was that the alleged assault was made upon a girl in her fifteenth year, probably with her consent, though she testified to the contrary, somewhat confusedly. She was weak minded and forgetful. She could write her name and it was said she could read the text in a picture book, but she held the book upside down and probably repeated from memory what had been read to her about the pictures. She had not learned all her letters, could not count up to fifty, nor tell time by a clock, though her father had tried to teach her. There was testimony that she was no more developed, either mentally or physically, than a child of eight years. She had been to school eighteen months, but had worked in a cotton mill three years, where she did the work of an average hand, in a satisfactory manner. Under the Georgia statute the age of consent is ten years; from that age to fourteen there is a rebuttable presumption of incapacity. Above fourteen there is presumptive capacity to consent. Applying as the test "mental capacity to understand the sexual act and to give intelligent assent to its commission," a majority of the court held that incapacity was not shown, and reversed the conviction. One judge, in a convincing dissenting opinion, took the ground that there was evidence justifying the verdict, especially as the jury and trial judge had seen the girl and heard her testimony, and thus could form their own opinions as to her capacity. Both opinions agreed that the age of consent fixed by the statute was so low "as to be an impeachment of the humanity and civilization of this state." The conviction was reversed.

APPEAL AND ERROR.

Sykes v. U. S., 204 Fed. 909, *Review allowed without assignment of error.* "In criminal cases, in which the life or the personal liberty of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as the absence of substantial evidence to sustain the conviction, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error."

BRIBERY.

People v. Hyde, 141 N. Y. Supp. 1089. *Benefits Received.* "The fact that on the request of accused, a city treasurer, a bank with which accused had deposited city funds acceded to his request that it loan a trust company a sufficient amount to tide it over an investigation by bank officials, under a threat by accused to withdraw the city's funds from such bank on refusal, did not constitute a personal advantage to accused so as to be a bribe within Penal Code, defining bribery; a "bribe" being a gift, not necessary of pecuniary value, bestowed for the purpose of influencing the conduct of the receiver, and must be of substantial and not mere imaginary value to him, or merely gratifying a wish or hope."

Ingraham, P. J., dissenting.

CONSTITUTIONAL LAW.

Commonwealth v. Kalck, Pa. 87 Atl. 61. "Indeterminate Sentence Acts of May 10, 1909 (P. L. 495), and June 19, 1911 (P. L. 1055), are not vulnerable to the objection that the titles are defective; that a new crime is created without notice in the title; that they are special legislation, that they transfer judicial discretion to a non-judicial board; that they assume to restrict the pardoning power; or that they conflict with the Constitution (article 3, Section 6), which provides that no law be revived or amended by reference to its title only, but shall be published at length as re-enacted."

People v. Rosenheimer, N. Y., 102 N. E. 530. *Self Incrimination.* "Highway Laws (Laws 1910, c. 374), Sec. 290, subd. 3, providing that any person operating a motor vehicle, who, knowing that injury has been caused to a person or property due to the culpability of the operator or to accident, leaves the place of the injury or accident without stopping, giving his name, residence, and license number to the injured party or a police officer, shall be guilty of a felony, is not invalid under Const. art. 1, Sec. 6, providing that no person shall be compelled in any criminal case to be a witness against himself; since because of their size and weight, great power and speed, and the fatalities caused by them the Legislature might absolutely prohibit the use of a motor vehicle on a public highway, and, therefore, assuming that the statute impairs the constitutional privilege, Legislature had power to require a waiver of that privilege as a condition to the use of the highways by a motor vehicle, at least to the extent to which it has required such waiver." Hogan, J., dissenting.

People v. Kaminsky, N. Y. 102, N. E. 515. *Right of Juvenile Offenders to Trial by Jury.* "The right of trial by jury is limited by Const. art. 6, Sec. 23, providing that the Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as shall be prescribed by law, and a statute which reduces all crime committed by children under 16 years to the grade of misdemeanors within the jurisdiction of the Court of Special Sessions is not unconstitutional, as depriving juvenile offenders of the right of trial by jury."

Journal of Commerce and Commercial Bulletin v. Burleson, 33 Sup. Ct. Repr. 867. *Newspaper Publicity Law.* "Both the text and the legislative history of that part of the postoffice appropriation act of August 24, 1912 (37 Stat. at L. 553, chap. 389), Sec. 2, which requires newspapers and periodical publications to file with the Postmaster General and the postmaster at the place where 'entered,' and to publish in the second issue thereafter, a sworn statement of average circulation, and of the names of editor, publisher, owners, stockholders, principal creditors, etc., under penalty, in case of failure, of denial of the 'privileges' of the mail, and to mark all paid reading matter 'advertisement,' under penalty of criminal prosecution for non-compliance, show that these provisions were intended simply to supplement existing legislation relative to second-class mail matter, and to impose additional conditions for admission to the privileged class of mail, and that they were not enacted as an exercise of legislative power to regulate the press or curtail its freedom."

CONSTRUCTION OF STATUTES.

Ex parte Goldsworthy, Cal. App., 134 Pac. 352. *Juvenile Court Law.* Section 26 of the Juvenile Court Law provides "In all cases where any child shall be dependent" . . . any person "who shall, by any act or omission, encourage, cause or contribute to the dependency" of such persons shall be guilty of a misdemeanor. Prisoner was convicted of a violation of this statute and imprisoned. The information upon which he was convicted did not charge that the child was, at the time the prisoner committed the acts charged in the information a "dependent" person. Contending that the statute did not apply unless the child were already "dependent" at the time of the prisoner's act, the prisoner petitioned for a writ of *habeas corpus.* Held that while the statute was obscure yet a careful analysis of its provisions shows that it was designed to apply to the person causing the dependency of the child, as well as to the one contributing further to such dependency after it had been caused. Held further that as the conviction in this case was had in a superior court having general jurisdiction, the information would not be scrutinized as closely on a writ of *habeas corpus* as it would be on a demurrer, because of the presumption in favor of the regularity of the proceedings and judgments of such courts. Hence the prisoner was remanded to custody.

State v. Cutts, Ida., 133 Pac. 115. *Making False Bank Report.* Defendant was convicted of making a false report concerning the financial condition of the bank of which he was cashier. The report was prepared in typewritten form by other persons, and was signed by the defendant at the request of a superior officer of the bank. The defendant did not know whether the report was true or false, but knew that it was a report of the financial condition of the bank, and knew its contents. The defendant contended that the statute did not apply unless he knew that the report was false. Held that the signing and delivery of the paper for use as a report constituted "making" the report within the meaning of the statute. That a cashier who signs and delivers such a paper, knowing what it contains, knowingly makes the report, and is responsible for its truth, unless he was himself deceived because of no fault or negligence on his part. If he signs it without actual knowledge as to its truth and without making any investigation himself to ascertain whether or not it is true, he is criminally responsible if it proves to be false. The conviction was affirmed.

Cosper v. State, Ga. App., 79 S. E. 94. *Carrying Weapons.* A statute made it a criminal offense to have or carry about one's person any pistol or revolver without first obtaining a license. The defendant found a pistol in the middle of the road. He picked it up and carried it to his father's house, where it was kept until the owner came and got it. The boy had no license. He was tried for violation of the statute and the trial court charged that on this evidence he was guilty, and he was convicted. Held as the statute did not prohibit the sale of pistols, the legislature evidently did not intend to prevent carrying a pistol from the place of sale to the home of purchaser. The statute was designed to prevent the more or less habitual carrying of weapons. While evidence of carrying on a single occasion might be sufficient to indicate that the accused habitually carried the pistol, in this case the evidence clearly showed that the carrying was a mere temporary incident, due

to an emergency, being necessary for the preservation of the weapon. Under such circumstances the carrying does not fall within the intent of the statute. Hence the conviction was reversed.

CONTEMPT.

In re Maury, 205 Fed. 626. *Disrespect of Counsel to Jury.* "Respondent, acting as attorney for plaintiff on trial of an action in a district court, while the jury was being impaneled stated, 'I cannot win this case in S. county, so my questioning will be very particular.' In opening his case to the jury he stated: 'Lawyers usually close their statements of this kind, that they expect a verdict at the hands of the jury. I do not expect more than a hung jury here against the defendant. If this case were in Dillon, Billings, Missoula, I would'—whereupon he was stopped by the court and reprimanded. Held, that such statements were disrespectful to the jury and punishable as a contempt."

ERROR WITHOUT PREJUDICE.

Skinner v. State, Ga. App., 79 S. E. 181. *Exclusion of Statement.* By statute the defendant in a criminal trial may "make to the court and jury such statement in the case as he may deem proper in his defense." The trial judge, applying the rules of evidence to such statement, excluded part of what defendant wished to say. There was a conviction and defendant appealed. Held that as the evidence clearly demanded the verdict, and would have authorized a conviction of a higher degree of the offense charged, and the matters excluded by the erroneous ruling of the trial court were trivial and inconsequential, the error could not be presumed to have harmed the accused. The conviction was affirmed.

EVIDENCE.

People v. Warren, Ill. 102 N. E. 201. *Dying Declaration.* "An instruction that declarations made by the decedent, of sound mind and fully impressed with the belief that he would die, and are entitled to the same weight as if made under sanction of oath is erroneous, for the weight to be given to a dying declaration is for the jury."

People v. Harris, N. Y., 102 N. E. 546. *In Rebuttal.* "In a trial for murder in the first degree, where the defense was that accused, incensed by his wife's declaration of illicit relations with another while she and defendant were voluntarily living apart, resulting in her pregnancy, and that in consequence thereof he shot her, in the heat of passion, without deliberation or intent to cause her death, testimony of two women as to the condition of the wife's clothing, indicated that menstruation had not ceased at the period to which her alleged declaration referred, and testimony of physicians who examined the remains of the wife and ascertained that she was not pregnant at the time of her death, offered in rebuttal on the theory that it was improbable that the wife would have made such a declaration, was inadmissible, since it introduced a collateral issue tending to obscure the main issue and to protract the trial to an unreasonable extent without any corresponding advantage."

EXTRADITION.

Charlton v. Kelly, 33 Sup. Ct. Repr. 945. *Extradition Treaty with Italy Construed.* "Citizens of the country of asylum are 'persons' within the meaning of the extradition treaty of 1868 with Italy, by which the two governments mutually agree to deliver up all persons who, having been convicted of or charged with any of the crimes specified, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other.

Executive recognition of the obligation of the United States to surrender its own citizens under the extradition treaty with Italy of 1868, and the supplemental treaty of 1884, notwithstanding the refusal of the Italian government to surrender fugitives of Italian nationality committing crimes in the United States, is a waiver of the breach, if any, and leaves the treaty in force as the supreme law of the land, which must be recognized by the courts."

FALSE PRETENSES.

State v. Stone, S. Car., 79 S. E. 108. *Statement of Opinion.* While prosecutor was at the store playing checkers, defendant drove up and suggested a horse trade. After some dickering as to boot, and seeing defendant's mare work, prosecutor agreed to trade, but said that defendant must "guarantee the horse to be sound." Defendant said "Yes," but added "I have only had the horse ten days; I will guarantee it as far as I know." The trade was made. The next morning the prosecutor discovered that the mare was blind in one eye, and could not see much out of the other. Witnesses who were present when the trade was made saw that the mare was blind in one eye, but thought the other looked all right. The defendant stopped one man who was trying to test her eyes. Defendant was a horse trader, and prosecutor relied on the representation, rather than upon his own judgment. The majority of the court held that the evidence showed that defendant knew that the mare was unsound. His statement that she was sound as far as he knew was a false statement of fact, rather than of opinion, and as it induced the trade, was a false pretense under the statute. One judge dissented on the ground that parties trading horses are allowed latitude in expressing their opinions of their horses, and trade generally with the intent each to get the better of the other, and the defect could have been discovered by the exercise of the slightest care. The conviction was affirmed.

FORMER JEOPARDY.

Black v. State, Ga. App., 79 S. E. 173. *Two False Statements under Same Oath.* In an action for damages, brought by the owner of a storehouse against a railroad company for negligently setting it on fire, defendant had testified that he was a single man. He was indicted for perjury in giving this testimony, admitted that he had so testified, and was acquitted. He was later tried for perjury upon a charge based on other testimony given by him in the same case. He pleaded former jeopardy. Held that the punishment for perjury "is directed against the moral obliquity of the witness as a whole, and consequently though more than one false statement be wilfully made by the witness on the same trial, he does not thereby become guilty of more than one offense of perjury." The judge who wrote the opinion also argued that as defendant had admitted that he testified as charged in the former case, the

only question then remaining for the jury was whether a lawful oath was administered and the acquittal negatives this; that the state was estopped by that finding from showing in the present case that a lawful oath had been administered. The conviction was reversed.

HOMICIDE.

People v. Galbo. 141 N. Y. Supp. 1078. *Identity of Decedent.* "Where the district attorney and counsel for accused assumed that the inquiry made and evidenced given relative to a body found related to the body of decedent, and a physician performing the autopsy on the body found testified that he performed the autopsy on the remains of decedent, and no question was made of the identity of the body found as that of decedent, and a witness testified without objection that he knew decedent and recognized the body found as that of decedent, a motion for acquittal for failure to prove that the body was the body of decedent was properly denied."

INDETERMINATE SENTENCE LAW.

Forbes v. State, Neb., 141 N. W. 197. *Not Applicable to Prior Crimes.* A burglary was committed and an information against defendants was filed before the Indeterminate Sentence Law took effect. They were tried and convicted after it took effect. The statute fixed the maximum penalty as life imprisonment, the minimum as twenty years. They were sentenced for the term of twenty-eight years, and appealed, contending that they should be discharged, as the new law required a life sentence and so changed the situation to their disadvantage and was *ex post facto,* hence they could not be sentenced under it, while the courts had lost the power to impose a fixed sentence through the repeal of the old law. The court apparently left the question open whether the Nebraska statute requires a sentence for the maximum term, and held that the legislature never intended the act to apply to crimes committed before it took effect, that as to such crimes the old law remained in force, and that the sentence was legally imposed under that law.

Stehr v. State, Neb., 142 N. W. 670. *Illegal Sentence.* A crime was committed January 22, 1911. The Indeterminate Sentence Law took effect July 7, 1911. The defendant was tried and convicted of the commission of the crime November 27, 1911, and was sentenced under the Indeterminate Law. Defendant's counsel did not call the attention of either the trial court or the appellate court to the fact that the crime was committed before this law took effect. But the appellate court, on discovering the fact, held that as the question involved a vital constitutional right of the defendant, and one affecting the power of the court to render the sentence imposed, it could not be ignored. As no other error appeared, the judgment of the trial court was affirmed as to everything except the sentence, and the case was remanded for the rendition of a valid judgment upon the verdict, in accordance with the law in force when the crime was committed.

INDIANS.

Lott v. U. S., 205 Fed. 28. *Soliciting Sale of Liquor.* "Cr. Code Alaska, Sec. 142 (Act March 3, 1899, c. 429, 30 Stat. 1274), as originally enacted, made the act of selling intoxicating liquor to Indians a misdemeanor only. By Act

Feb. 6, 1909, c. 80, Sec. 9, 35 Stat. 603, the severity of the punishment was increased and the offense was made a felony by Cr. Code, Sec. 335. (Act March 4, 1909, C. 321, 35 Stat. 1152 (U. S. Comp. St. Supp. 1911, p. 1687)): Held, that it would not be presumed that the change making the offense a felony was intended also to make it an offense for an Indian to solicit or purchase liquor and hence, notwithstanding Section 218, Pen. Code Alaska, adopts the common law of England except as modified by statute, and at common law one who solicits another to commit a felony committed an indictable offense, an Indian who induced another to sell whiskey to him was not punishable for soliciting and inciting another to commit a crime."

INDICTMENT.

People v. Evans, 143 N. Y. Sup. 49. *Ground for Setting Aside.* "Notwithstanding Code Cr. Proc. Sec. 313, limiting the causes for setting aside an indictment to certain cases of failure to comply with the statutes, the person indicted has a constitutional right to move its dismissal, if the legal evidence received by the grand jury was insufficient to support the indictment."

Lay v. State, Ind. 102 N. E. 274. *Sufficiency.* "An affidavit instituting a prosecution for trespass on the inclosed lands of F. was signed by him, following which was the jurat of the justice of peace. Held that the affidavit was sufficient to show the name of F. as the affiant and that he was sworn according to law, without a formal commencement stating such fact, and this notwithstanding the fact that the commencement of the affidavit stated the name of another person as the affiant."

INSTRUCTIONS.

State v. Almos, Minn., 142 N. W. 801. *Argumentative Charge is Erroneous.* On appeal from a conviction of grand larceny, the defendant assigned as error several portions of the instructions to the jury which emphasized the testimony favorable to the state, explained away discrepancies in the state's case and discredited the case and testimony of the defendant. The charge also called attention of one or two discrepancies in the state's case. Held that while no one of these assignments would itself be sufficient to warrant a reversal, all of them taken together, in connection with the general tone and tenor of the charge, made it argumentative and unfair, and tended to prejudice the substantial rights of defendant upon the merits. Hence the conviction was reversed.

JURY.

Commonwealth v. Nye, Pa., 87 Atl. 585. *Summons.* "That the sheriff summoned jurors by mail instead of delivering separate tickets to them as provided by the act of April 14, 1834 (P. L. 333), was not ground for challenging the array where all jurors summoned, except six, acknowledged receipt of the notices and were present when the case was called; the provisions of such statute being directory only."

MONOPOLIES.

Nash v. U. S., 33 Sup. Ct. Rept. 780. *Anti-Trust Act—Vagueness.* "There is no such vagueness in the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200) as to render it inoperative on its

criminal side, because only such contracts and combinations are within the act as, by reason of intent, or of the inherent nature of the contemplatel acts, prejudice the public interests by unduly restricting competition, or unduly obstructing the course of trade."

PAROLE.

State v. Goddard, Or., 133 Pac. 90. *Not a Waiver of Right to Appeal.* The defendant was convicted of a felony, and sentenced to a term of twenty years in the penitentiary, and by the same judgment released on parol. He had not requested the parol. He appealed from the judgment, and a motion was made to dismiss the appeal on the ground that by accepting the parol he had waived his right to appeal. Held that beyond the fact that defendant had not tried to break into the penitentiary by force there was nothing to indicate that he had accepted the parol. If he had insisted upon being received into the penitentiary his request would probably have been refused and the fact that he had done so might have been urged as a waiver of his right of appeal. If he had affirmatively accepted the condition imposed in the parol, he would probably have thereby waived the right to appeal. As he had not, he retained the right. Hence the motion to dismiss was overruled.

POST OFFICE.

Stockton v. U. S., 205 Fed. 462. *Scheme to Defraud.* "An indictment, alleging that defendant, a manufacturer of loaded dice, marked playing cards, etc., designed and intended to defraud persons induced to play with the buyers thereof, devised a scheme or artifice to defraud such persons, and, intending to so defraud them, did unlawfully etc., place in the post office a printed catalogue, directed to certain individuals designated, by which defendant sought to sell such articles to the addressees, intending that they should use the same in playing with third persons, and that the latter should be defrauded. Held that since the mailing of defendant's catalogue advertising the sale of such articles was not an element of a scheme to defraud, and the scheme to defraud, if any, would be that devised and perpetuated by the buyers of the apparatus when they used the same, in which defendant had no part, his actual intent being co-extensive only with his own transaction in selling or offering to sell articles which could be misused, the indictment did not allege the offense defined by Pen. Code, Sec. 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 (U. S. Comp. St. Supp. 1911, p. 1653)), prohibiting the use of the mails in furtherance of a scheme to defraud, and was therefore demurrable."

PROSTITUTION.

U. S. v. Flaspoller. 205 Fed. 1006. *White Slave Act.* Construed. "The White Slave Act (Act June 25, 1910, c. 395, 36 Stat. U. S. Comp. St. Supp. 1911, p. 1343) prohibits the transportation, etc., of women in interstate commerce 'for the purpose of prostitution or debauchery or any other immoral purpose.' Held, that the words 'any immoral purposes,' though construed in accordance with the rule of *e-jusdem generis,* were satisfied by an indictment charging that accused persuaded a woman to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation, and con-

cubinage with accused; illicit cohabitation and concubinage being immoral acts, analagous to prostitution within the letter of the act."

SENTENCE.

State v. Huggins. N. J., 87 Atl..630. *Disposition of Excessive Sentence.* "Where a general verdict of guilty was rendered upon an indictment charging a man in separate counts with rape and carnal abuse, which conviction is to be sustained as to carnal abuse, and he was given an indeterminate sentence, the maximum of which is the extreme penalty for rape and is in excess of the maximum sentence which may be imposed for carnal abuse, this court, having to reverse the judgment because of error in the sentence, has the power under section 144 of the criminal procedure act (2 Comp. St. 1910, p. 1867) to render such judgment as should have been rendered (that is, by amendment make the sentence such as might have been passed) or to remand the case for that purpose to the court before which the conviction was had."

State v. Clifford, M. J. 87 Atl. 97. *Effect of Partial Suspension of Sentence.* "Where the defendant was convicted of keeping a disorderly house, and was sentenced to pay a fine of $500 and serve a term in prison, the prison portion of the sentence to remain suspended during good behavior, and defendant paid the fine and two years thereafter was again convicted and sentenced for a similar offense, and the court revoked the suspension of the former sentence, and imposed it to run concurrently with the sentence imposed for the second conviction. Held that defendant having paid the fine under the adjudication of this court in *State v. Addy,* 43 N. J. Law, 113, 39 Am. Rep. 547, the imposition of the first sentence as a part of the second sentence was illegal."

SUNDAY.

People v. Friedman, 142 N. Y. Supp. 366. *Statute Construed.* "In a prosecution under Penal Law (Consol. Laws 1909, C. 40) Sec. 2147, prohibiting the public selling of any property on Sunday, except that articles of food may be sold and supplied before 10 a. m., and except also, that meals may be sold to be eaten on the premises where sold, or served elsewhere by caterers, defendant who made a single sale of cooked ham and sturgeon on Sunday at 4:30 p. m. at his delicatessen store, where he served cooked food and meals to be eaten on the premises or to be removed and consumed elsewhere, on evidence not showing that the ham and sturgeon did not constitute a 'meal' and were not sold to be eaten on the premises, could not be convicted; since the purpose of the law was to prevent the interruption of repose and religious liberty, and since it was within the exception which embraces both public sale of meals to be eaten where sold and the public sale of meals to be served elsewhere and which permits sales by any one of the meals to be eaten on the premises where sold, and public sales by caterers of meals to be served elsewhere, the word 'meal' meaning a portion or quantity taken at one of the regular times for refreshment or upon occasions of hunger, to satisfy the appetite."

McLaughlin and Clarke, J. J., dissenting. See Chap. 346. Laws, 1913, for subsequent change in statute.

TRIAL.

People v. Heineman, 142 N. Y. Sup. 833. *Improper Remarks of Judge.* "In a prosecution for manslaughter, where the court, after counsel for the defense had summed up to the jury, asked him to repeat his motion for a directed verdict and again overruled the motion, making certain remarks as to the distinction between murder and manslaughter, such remarks, while improper at that time, are not reversible error, being addressed only to a question of law, where the jury is properly instructed that they are the sole judges of the facts, since the jury could not have construed the remarks as an instruction to them."

Commonwealth v. Shoemaker, Pa. 87 Atl. 684. *Argument of Counsel.* It is error for the prosecuting counsel to state his own knowledge of the facts unless he has testified thereto as a witness, or to insinuate that he has knowledge of facts which are calculated to prejudice accused.

In a murder case, it was improper for the district attorney to state in argument that he would not say anything about the flight and return of defendant, "as there some things between the defendant's counsel * * * and the district attorney, which, if divulged, would certainly lead to his conviction."

The district attorney is a quasi-judicial officer, and should present the commonwealth's case fairly, and not press upon the jury any deductions that are not strictly legitimate.

WITNESSES.

Murphy v. State, Md. 87 Atl. 811. *Impeachment.* "Where a party calls on a witness on the faith of statements made before trial, either to the party or his attorney, and the witness' testimony is variant from such statements, he may be asked whether he made them, and if he denies it, proof of the statements may be shown in the discretion of the court if it appears that the party has been surprised; consequently, in a prosecution for assault with intent to kill, evidence of statements made, not to the prosecutor, but to the prosecuting witness, cannot be received, even though the witness' testimony varied from such statements, for the exception should not be extended; the admission of such testimony tending to confuse the jury."

Hagger v. State, Okla. App. 133, Pac. 263. *Scope of Cross Examination.* A defendant, on trial for the statutory crime of giving away whiskey, took the stand in his own behalf. On cross examination he was asked about keeping whiskey at his camp at other times, making an assault with a pistol, getting drunk, and having previously been arrested on a charge like the one for which he was on trial. This cross examination was permitted by the trial court in spite of objections of defendant's counsel. Held that as the cross examination was "full of insinuations and intimidations that appellant was guilty of a number of offenses, which could not be otherwise than prejudicial to defendant," the judgment should be reversed. "This court stands squarely for the doctrine of harmless error, but it is equally committed to the doctrine that fairness must prevail in the trial of criminal cases. We will not tolerate police court methods in courts of record. Trial courts should confine the cross-examination of witnesses to legitimate subjects of inquiry, and should

not permit a witness to be brow-beaten or asked insulting questions." The conviction was reversed.

State v. Hazzard, Wash., 134 Pac. 514. *Scope of Cross Examination.* A doctor was on trial, charged with the murder of a patient. The trial court permitted the state, on cross-examination of a witness who had testified for the defendant, to show that the witness was interested in an undertaking firm, which during the preceding three years had buried five or six of the doctor's patients. There was no suggestion that any of these patients had died from other than natural causes. Held that while the court had permitted wide latitude to the cross-examiner, it did not necessarily commit a reversible error. "It is not every error that calls for a reversal of a cause; only those that appear to be prejudicial." As the trial lasted sixteen or seventeen days, the jury reached its verdict, not by any one circumstance appearing during the trial, but by the general impression which the testimony as a whole had upon their minds, it would be unreasonable to hold that this cross-examination could have any material effect upon their verdict. The conviction was affirmed.

DISCOVERY OF BOOKS AND PAPERS.

Chase's Code Civil Procedure. Par. 803. (Am'd. 1909, 1913.) *Court may direct discovery of books, etc.*

A court of record, other than a justice's court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy or photograph, of a book, document, or other paper, or to make discovery of any article or property, in his possession or under his control, relating to the merits of the action, or of the defense therein.

From 2 R. S. 199 (Part 3 c. 1, tit. 3), 21; Co. Proc. 388; L. 1841, c. 38, Am'd. by L. 1909, c. 173; L. 1913, c. 86 (in effect Sept. 1, 1913.)

(The 1913 Revision consists of addition of words "or photograph.")

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INFAMOUS CRIMES AGAINST NATURE

At first blush the decision in *The People v. Smith,* 258 Ill. 502, 101 N. E. 957, (1913), in regard to the infamous crime against nature seems wrong. It was there decided that the insertion of his tongue by the defendant in the private parts of a little girl does not constitute a violation of section 47 of the Criminal Code of this state, which provides: "The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not more than ten years."

In most states it is held that the infamous or abominable crime against nature covers only those acts that constitute the crime of sodomy. Sodomy usually is defined, as is said by Mr. Justice Carter, in dissenting as "carnal copulation in an unusual manner." Sodomy, it is conceded, does not include penetration into the mouth.

Accordingly, it may be said, the Supreme Court of this state went far when it decided that the infamous crime against nature is broader than sodomy and does include acts of penetration in the mouth *(Honselman v. People,* 168 Ill. 172, (1897), *Kelly v. People,* 192 Ill. 119 (1901)).

The opinion by Mr. Chief Justice Dunn says, p. 503, "In all the cases in which convictions have been sustained of which we have knowledge, the male sexual organ was inserted." We have been unable to find cases of a different character. This, however, is no reason why the act in question is not a crime against nature. But the following section of the statute, section 48, provides: "It shall not be necessary to prove emission, to convict any person of the crime against nature." This provision indicates the legislature had in mind only those acts involving the male organ.

The dissenting opinion says, p. 508, "we have held * * * in *Honselman v. People,* 168 id. 172, that this offense includes, under our statute, all forms of bestial or unnatural copulation." We think the case hardly went that far. It did hold, p. 175, that the paragraph "defining infamous crimes plainly shows that the legislature included in the crime against nature other forms of the offense than sodomy or buggery." The opinion by Mr. Justice Cartwright goes on: "The method employed in this case (penetration of the mouth) is as much against nature, in the sense of being unnatural and against the order of nature, as sodomy or any bestial or unnatural copulation that can be conceived."

In view of the emission section of the statute, we can't agree with Mr. Justice Carter that under the reasoning of the Honselman, Kelly and Abrams cases *(People v. Abrams, 249* Ill. 619), and some others, it should be held that the evidence in this case showed plaintiff in error guilty of the crime against nature.

However, to the lay mind, this question occurs at once: "Why is it a crime for a man to apply the mouth to the private parts of a boy and not a crime to do the same thing to a girl?"

That brings us to the point: amend the crime against nature statute to cover this act and any of like chcaracter. In Louisiana, when it became doubtful if their statute covered penetration *per os,* the legislature amended, covering it specifically, *State v. Vicknair,* 52 La. Ann. 1921 (1900).

As the law now stands there can be no prosecution in this state for this offense, and of abuse of a female if she be above the age of 18 years.

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